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Sovereign Lands

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I. Introduction

The following cases and legislative activities impact oil and gas development on Sovereign Lands. The BLM's stated goal for 2017 is for online leasing of onshore oil and gas to be available for all sales.[1] Energynet.com, Inc., a private corporation, conducts the online sales.[2] Energynet's online auction site platform serves private and government clients.[3] Commentators disagree about the motivation and impact of federal online leasing.[4] Environmentalist decry the movement as an attempt to

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1. *See* Statement of Neil Kornze, Dir. of the Bureau of Land Mgmt., U.S. Dep't. of Interior, "Recent Management of Oil and Gas Lease Sales by the Bureau of Land Management" (Mar. 23, 2016), https://www.doi.gov/ocl/blm-lands-leasing.

2. *See About EnergyNet*, ENERGYNET, https://www.energynet.com/page/About_Us (last visited Sept. 20, 2017).

3. *Id*.

4. *See* Rebecca Moss, *BLM: Auctions for Oil, Gas Leases Go Online*, SANTA FE NEW MEXICAN (Aug. 30, 2016), http://www.santafenewmexican.com/news/local_news/blm-auctions-for-oil-gas-leases-go-online/article_e213f1ea-3e61-550e-91f0-ab063e2ceffe.html.

conceal federal leasing, while industry insiders emphasize that modernization of the process leads to efficiency and savings.[5]

II. Fletcher v. United States

A certified class of Osage tribal members, owning royalty interests in the Osage reservation in Oklahoma, sued the government in the United States District Court for the Northern District of Oklahoma seeking an accounting of royalty payments made and a restriction limiting royalty payments to tribal members only.[6] The Secretary of the Interior serves as a fiduciary to the Osage tribal members and must manage the royalty payments due the tribal members and provide an accounting.[7] The suit alleged that the government mismanaged assets and failed to provide accounting, thus improperly distributed royalties to non-Osage tribal members.[8]

The district court dismissed the suit, concluding that the obligation to provide an accounting was limited to deposits and such an accounting would not support a claim of mismanagement.[9] The Tenth Circuit Court of Appeals reversed and remanded that decision, directing that, to provide transparency, an accounting must detail information related to disbursements as well, and gave guidance on how to balance completeness with practicality.[10] On remand, the district court ordered the government to provide an accounting running back to 2002.[11] The tribal members appealed seeking to expand the scope of the accounting and extend the time period back to 1906.[12] Before the appeal, the court dismissed the mismanagement claim without prejudice, but the tribal members acknowledged that the claim may be re-filed after review of the accounting they sought.[13]

The court confirmed the lower court's order in terms of both scope and duration. The court reasoned that going back to 1906 was not reasonable

5. *Id*.; *see also* James Fenton, *BLM to Hold Online Oil and Gas Lease Sales*, USA TODAY (Sept. 1, 2016), https://www.usatoday.com/story/money/industries/oil-gas/2016/08/31/blm-hold-online-oil-and-gas-lease-sales/89658142/.

6. Fletcher v. United States, 854 F.3d 1201 (10th Cir. 2017).

7. *Id*. at 1203.

8. *Id*.

9. *Id*. at 1204.

10. *Id*.

11. *Id*.

12. *Id*.

13. *Id*. at 1205.

but punitive, and "does not achieve the balance [it] envisioned . . . ."[14] Further, the court held that requiring the government to provide an accounting of volumes sold and prices received, which would enable a determination of whether the Secretary obtained proper market rates, was unjustifiably expensive.[15] The court noted that such an accounting would result in spending billions to recover millions and as such was "nuts."[16]

III. Wyoming v. United States Dep't of Interior.

On November 18, 2016, the Bureau of Land Management ("BLM") "issued [a] final rule related to the reduction of waste of natural gas from venting, flaring, and leaks during oil and natural gas production activities on federal and Indian lands."[17] The States of Wyoming, Montana, and North Dakota (collectively, the "Petitioners") attempted to obtain a preliminary injunction to enjoin the Rule claiming "it exceed[ed the] BLM's statutory authority and [was] otherwise arbitrary and capricious."[18]

The BLM claimed that the majority of flaring on its leases was due to the inability of the infrastructure to keep pace with new well construction.[19] The BLM concluded there was a "'compelling need to update . . . requirements to make them clearer, more effective, and reflective of modern technologies and practices . . . ."[20] Accordingly, the BLM went through the rule-making process.

The final rule (the "Rule") would have prohibited venting, except in emergencies or when flaring is technically infeasible.[21] Both the capture percentage and the flaring allowance would phase in over a ten-year period.[22] The BLM's primary purpose aimed at waste prevention, while noting methane and other air pollutant reductions as "ancillary."[23]

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14. *Id*. at 1206.
15. *Id*. at 1206-07.
16. *Id*. at 1207.
17. Wyoming v. U.S. Dep't of Interior, No. 2:16-CV-0280-SWS, 2017 WL 161428, at *1 (D. Wyo. Jan. 16, 2017) (citing Waste Prevention, Production Subject to Royalties, & Resource Conservation, 81 Fed. Reg. 83,008 (Nov. 18, 2016) (to be codified at 43 C.F.R. pts. 3100, 3160, & 3170)).
18. *Id*. at *1.
19. *Id*. at *2 (citing Waste Prevention, Production Subject to Royalties, & Resource Conservation, 81 Fed. Reg. at 6619).
20. *Id*. (quoting Waste Prevention, Production Subject to Royalties, & Resource Conservation, 81 Fed. Reg. at 83,017).
21. *Id*. at *2 (citation omitted).
22. *Id*.
23. *Id*. at *3.

The Petitioners contended that the Rule attempted an unauthorized regulation on air pollution, duplicating and potentially undermining agencies authorized by Congress with regulating air quality.[24] Congress specifically delegated authority to the EPA and the states through the Clean Air Act ("CAA") to create, "a comprehensive scheme for regulating air quality through 'a cooperative-federalism approach'. . . ."[25]

The court noted that to obtain a preliminary injunction the Petitioners had to show: " '(1) a likelihood of success on the merits; (2) that they will [likely] suffer irreparable harm; (3) that the balance of equities tips in their favor; and (4) that the injunction is in the public interest.'"[26]

The court denied the injunction concluding that the Petitioners had not met the requisite showing of a clear and unequivocal likelihood of success on the merits and irreparable harm.[27] The other factors were therefore irrelevant.

Thus, the court found that the Petitioners were not likely to succeed on the merits and there would not be irreparable harm if the rule were implemented.[28]

24. *Id*.

25. *Id*. (quoting Oklahoma v. Envtl. Prot. Agency, 723 F.3d 1201, 1204 (10th Cir. 2013)).

26. *Id.* at *3. (quoting Petrella v. Brownback, 787 F.3d 1242, 1257 (10th Cir. 2015)).

27. *Id.* at *12.

28. *Id*. at *10-12.